Supreme Court, U. S.
FILED
AUG 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1707

JUAN M. HUERTA, *Petitioner*
v.
THE UNITED STATES, *Respondent*

On Petition For a Writ of Certiorari To the United States Court of Claims

PETITIONER'S REPLY TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

F. TROWBRIDGE VOM BAUR
1700 K Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Of Counsel:

HOWARD GALBUT
Miami, Florida
THEODORE M. TRUSHIN
Miami, Florida
FLORENCE D. WEIGHT
RICHARD McKIM PRESTON
VOM BAUR, COBURN, SIMMONS & TURTLE

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1707

JUAN M. HUERTA, *Petitioner*

v.

THE UNITED STATES, *Respondent*

On Petition For a Writ of Certiorari To the United States Court of Claims

---

PETITIONER'S REPLY TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

Respondent controverts very little in our Petition for Certiorari.

1. On Page 2, Respondent states that the Court of Claims found that Petitioner had never made a request to take his materials from the base into Cuba, suggesting that this was the "lesser of two evils." Although Respondent does not come right out and say so, the supposedly greater "evil" is suggested to be a threat by Cuban officials to "confiscate" Petitioner's

materials if they were removed into Cuba. But Respondent does not deny that, as set forth in our Petition, pages, 15, 16, "confiscation" of the salvaged materials would have been a sheer, physical impossibility. Hence, any findings by the Court below based upon a likelihood of "confiscation" of the salvaged materials are unsupported by credible evidence.

2. *Taking by Sovereign Act:* Failing to face up to or even mention the key language in the opinion below dealing with "taking" by sovereign act (Pet. p. 12), Respondent now (p. 3) apparently backs away from its position in the Court below (Pet. pp. 11, 12) that a sovereign act cannot constitute a taking under the Fifth Amendment. But Respondent did so argue in the Court below, and it so held. It held that the 1960 Commerce Department Export ban, and the 1962 Trade Embargo constituted

> "government actions that deprived him of his property. But those public acts were general acts of the sovereign and do not establish liability for breach, or for a taking." Pet. App. A-9, note 2.

Apparently, Respondent seeks to avoid having this Court settle this important question in our case so as to leave Respondent free to continue to raise this specious defense in other cases.

However, Respondent does go so far as to state that the "trade embargo at most prevented petitioner from removing his property into Cuba." (p. 3.) Even if this were all the Court below held, that would constitute a "taking." Prohibiting Petitioner from removing the materials into Cuba—the only place where they could be sold—constituted a taking of his property. So far

as Petitioner was concerned, this prohibition rendered his materials valueless.

In addition, the cases cited by Respondent (p. 3) confirm that the Government "took" the Huerta's property for purposes of the Fifth Amendment. In *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F.2d 646 (1st Cir. 1974), the Court stated:

> "First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, the right to use . . . property in a particular and permitted way may be transferred to . . . a governmental body. Only the second and third situations are thought of as takings today." 504 F.2d at 679.

In our case, both the second and third situations described above are present. All uses to which the Huertas might have put their property were forbidden by the embargo; and as there is no private property on Guantanamo, the right to use the property at all was effectively transferred by the embargo to the United States. Indeed, all Petitioner's materials wound up in the hands of the Government.

Moreover, removing the goods from the Base for sale anywhere except Cuba, including sale in the U.S., would violate the Treaty provisions with Cuba which prohibit the use of the Base for "any commercial, industrial or other enterprise." Pet. p. 5. In addition, the officials at Guantanamo refused to allow Petitioner to try to sell his materials elsewhere. Pet. p. 5, Finding 43.

We submit that it is elementary that private property can be taken for public use by sovereign act. When private property is taken for public use by sov-

ereign act, a "taking" under the Fifth Amendment necessarily occurs. Otherwise, the Fifth Amendment would be meaningless.

3. *Sergeant Alvarez:* On Page 4, Respondent takes refuge in an erroneous representation of Petitioner's position with regard to the testimony of Sergeant Alvarez. We never contended that "the Court below refused to accord proper weight to petitioner's evidence." Our position is that the Trial Judge erroneously disregarded the testimony of Sergeant Alvarez on the astonishing ground that it was "hearsay." Pet. p. 7. Indeed, Respondent does not deny that Alvarez' testimony was disregarded below as "hearsay." Respondent, however, asserts (p. 4) that the testimony as to whether Petitioner requested permission to remove the materials into Cuba was in " 'direct conflict' (Pet. App. A-4)." But any such "conflict" did not embrace the testimony of Sergeant Alvarez. Having been disregarded as "hearsay," (Pet. p. 7) the Alvarez testimony was necessarily excluded from the evidence which was deemed to be in conflict. Moreover, the fact that as "hearsay" the Alvarez testimony was excluded from consideration is vividly shown by the fact that the Court below made no mention of its content, which is briefly summarized in the Petition at pages 7 and 8.

In addition, Sergeant Alvarez' undisputed testimony went far beyond stating that there had been many requests by Petitioner to remove his materials into Cuba. For Alvarez' testimony was that Alvarez was told by his superiors, who also knew all about Petitioner's requests to remove the materials, that permission to remove the materials "would not be granted." "Nothing could be done for the Huertas." "We could not get the

permission that they [the Huertas] wanted." Pet. p. 8. It is also undisputed that it was Guantanamo Base policy "not to help the Castro Government." Pet. p. 8. *See also* Petition, pp. 7, 8.

4. *The Physical Taking of Petitioner's Materials:* Respondent does not deny that the strong and powerful evidence of a physical taking of Petitioner's materials by U.S. Government employees, many in military uniform and actually using U.S. Government trucks (Pet. pp. 8-10), is undisputed, and that Judge Davis in his articulate dissent stated that it was undisputed. Pet. App. A-10.

Nor does Respondent deny that the Trial Judge substantially admitted that substantial amounts of Petitioner's materials were physically taken by civilian employees of Respondent and were incorporated into "family residences" which were U.S. Government buildings at Guantanamo. Pet. p. 10. Thus, these are admitted takings under the Fifth Amendment on this record, of the most glaring and flagrant character. This fact alone requires a reversal of the decision below.

As for the vague statements in the majority opinion that the "authority of the alleged pilferers was not established," etc. (Resp. p. 4), the evidence showing that the materials were taken by Government employees, and that they wound up in the hands of the Government and in Government buildings is not only undisputed. In addition, the majority opinion never even ventured to disagree with the facts stated in Judge Davis' dissent summarizing the physical takings of Petitioner's materials and their incorporation into U.S. Government buildings.

All in all, the Petition raises the major question, among others, whether a sovereign act can constitute a "taking" under the Fifth Amendment. We submit that that question should be settled by this Court.

The physical takings of Petitioner's materials are undisputed.

In addition, the decision below represents a serious miscarriage of justice, which we submit this Court should correct.

Respectfully submitted,

F. TROWBRIDGE VOM BAUR
1700 K Street, N.W.
Washington, D.C. 20006

Attorney for Petitioner

Of Counsel:

HOWARD GALBUT
Miami, Florida
THEODORE M. TRUSHIN
Miami, Florida
FLORENCE D. WEIGHT
RICHARD MCKIM PRESTON
VOM BAUR, COBURN, SIMMONS &
TURTLE

August 26, 1977